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HEADLINE: DOJ Guidelines Offer Strategy Clues

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HIGHLIGHT:
'Federal Prosecution of Corporations' can assist defense counsel in understanding factors agency weighs in deciding to indict.

ALTHOUGH THE prosecutor's decision to indict is often a complex one, it generally boils down to two crucial questions: Did the target do it, and can the government prove beyond a reasonable doubt that the target did it?[1] That said, there are a number of concerns unique to corporate defendants that federal prosecutors will now take into account as a result of a new set of nonbinding guidelines issued by the U.S. Department of Justice, titled *Federal Prosecution of Corporations.*[2]

For defense counsel, the new guidelines provide a road map for pre-indictment advocacy. The best efforts to convince the government not to indict a corporate client will use the common vocabulary of these new guidelines and, more generally, take advantage of the similarities and differences between charging individuals and charging corporations that the new guidelines articulate.

Although they advise federal prosecutors to treat corporations neither more leniently nor more harshly because of their artificial nature, the guidelines note the unique public benefits to charging corporations in appropriate cases. First, indictment of one corporation "for criminal conduct that is pervasive throughout a particular industry" may result in "deterrence on a massive scale" and industrywide remediation. Second, indictment of a corporation is likely to be a catalyst for change in the culture of an indicted corporation. Finally, the guidelines note that certain crimes which create a substantial risk of great public harm are more likely to be committed by businesses and may create a substantial federal interest in prosecuting corporations.[3]

The guidelines' view of corporate deterrence is note-worthy for several reasons. When a corporation is indicted for what turns out to be industrywide conduct, defense counsel will have a wide-open opportunity to argue that the criteria used to select the company to indict were either inappropriate or misguided, or that the conduct was pervasive because the law in a particular area was unclear, and therefore enforcement was lax for good reasons.

Second, the new guidelines apply the concept of "corporate culture" to describe several different concepts, such as whether the company has a rigorous and entrenched compliance program, the company's history of criminal or civil violations, and the pervasiveness of wrong-doing within the company. Because the idea of corporate culture can embrace practically anything positive or negative about a particular company, defense counsel should see corporate culture as an opportunity to present a corporate client in the best possible light.

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[1] For a general overview of the considerations of prosecutors in deciding whether to indict both individuals and corporations, see, generally, Carl H. Loewenson Jr., "The Decision to Indict," 24 Litigation 13, 13 (Fall 1997).

[2] Although not yet published, Federal Prosecution of Corporations, together with a memorandum from Deputy Attorney General Eric H. Holder Jr. (June 16, 1999), is available from DOJ's Office of Public Affairs. Information about that office is available at www.usdoj.gov/03press/index.html.

[3] Id. § I.B.

The guidelines recite black-letter law on corporate liability for the acts of their agents: Corporations may be held liable when an agent acted within the scope of his or her duties and intended to benefit the corporation. Notably, however, the guidelines take the broad view of the "intent to benefit" prong of this test and instruct prosecutors that the agent need only have intended to benefit the corporation in part and that the company need not, in fact, have benefited from the agent's behavior.[4] Even setting aside the truly rogue employee, for example, who is defrauding both the employer and a third-party vendor, to argue that an agent was not acting within the scope of his or her duties and had no intent to benefit is likely to be an uphill battle.[5]

Prosecution priorities

The guidelines counsel federal prosecutors to use a common set of eight factors whenever they are deciding whether to indict the corporate or individual target of an investigation.[6] Those factors are the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's history of similar conduct; the corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in an investigation of its agents; the corporation's compliance program; the corporation's remedial actions; the collateral consequences of a corporate indictment; and the adequacy of non-criminal remedies.[7]

The guidelines remind prosecutors to be aware of the specific enforcement priorities and policies of DOJ's different divisions. For example, the guidelines note that the Tax Division strongly prefers prosecution of individuals, rather than entities, and that the Antitrust Division views compliance programs and pre-indictment cooperation differently than do other DOJ divisions.[8]

Some of these specific policies -- for example, the Antitrust Division's policy of granting amnesty only to the first corporation to disclose its price-fixing behavior to the government -- may be the primary determinant of defense counsel's strategy. Therefore, defense counsel should consult someone with specific expertise in dealing with a particular regulatory agency or division of DOJ.

The measure of pervasiveness -- the second factor -- is the number of individuals who participated in, or were willfully ignorant of, the illegal conduct, and the level of responsibility of those people.[9] Mirroring the sliding scale set forth in the U.S.

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[4] Id.

[5] See, e.g., U.S. v. Sun-Diamond Growers of California, 964 F. Supp. 486 (D.D.C. 1997) (jury could have found that corporation benefited from acts of vice president), aff'd in part and rev'd in part on other grounds, 138 F.3d 961 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999).

[6] See, generally, United States Attorney's Manual §§ 9-27.200 through 9-27.260 (rev. ed. Sept. 1997); Loewenson, supra n. 1., at 13-14.

[7] Federal Prosecution of Corporations § 11.A.

[8] Id. § III.B.

[9] Id. § IV (citing U.S. Sentencing Guidelines (U.S.S.G.) § 8C.5, comment. (n. 4)).

Sentencing Guidelines for Organizations,[10] the corporate prosecution guidelines suggest that the less serious the offense, the more pervasive the offense needs to be for a corporate indictment to be appropriate.

Conversely, the more serious the offense, the less pervasive the offense needs to be in order to charge the corporation. The new guidelines also indicate that the most important factor in determining whether criminal conduct was pervasive is the role of management. In DOJ's eyes, a corporation's "management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged."[11]

Corporate counsel should therefore involve high-level management in efforts to drive compliance through an organization. After things have soured, defense counsel should seek to temper prosecutors' expectations about how much senior management could have foreseen and prevented criminal conduct by sales personnel in, for example, the North Dakota office of a multinational corporation.

The term "corporate culture" appears again in the guidelines' discussion of a corporation's history. The guidelines note that a corporation's "history of similar conduct, including criminal, civil, and regulatory enforcement actions," should be considered in determining whether to bring criminal charges.[12] Referring to the Sentencing Guidelines, the new guidelines note that, in making a determination about a corporation's past conduct, "the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered."[13] It is unclear, however, whether this language accurately echoes the principles of the Sentencing Guidelines.

Although the Sentencing Guidelines require that the conduct of an entity be considered without regard to its legal structure or ownership, they also note that "in determining the prior history of an organization with separately managed lines of business, only the prior conduct or criminal record of the separately managed line of business involved in the instant offense should be considered."[14]

Defense counsel should try to prevent a prosecutor from branding a company as having a lawless corporate culture by lumping together unrelated acts of wrongdoing from discrete parts of the organization. Indeed, in these days of spinoffs and rapid M&A activity, two subsidiaries or divisions may not even have been part of the same corporate group when one of them committed a prior offense.

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[10] See U.S.S.G. § 8C2.5(b).

[11] Federal Prosecution of Corporations § IV.B.

[12] Id. § V.

[13] Id. § V.B.

[14] U.S.S.G. § 8C2.5, comment. (n. 5); see also U.S.S.G. § 8C2.5, comment. (n. 6).

Corporations come clean

The next factor is the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation."[15] Cooperation may mean identifying responsible individuals within the corporation, making witnesses available, disclosing the results of an internal investigation or, if necessary, waiving the attorney-client privilege and work-product protection.[16] Because investigations of corporate wrongdoing can be difficult, the guidelines also permit nonprosecution agreements with corporations.[17]

The guidelines address three considerations in determining whether a corporation's cooperation is adequate. The completeness of the disclosure about the results of an internal investigation may be measured by the waiver of the attorney-client privilege and work-product protection. Prosecutors may request a waiver "in appropriate circumstances" -- for example, "to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation and immunity agreements" and to evaluate the completeness of the company's disclosure.[18] Waivers, however, are only one measure of cooperation and not an absolute requirement. Creative defense counsel may be able to arrange other mechanisms to provide full disclosure, short of handing over to the government the results of an internal investigation.

The guidelines' suggestion of waiving the attorney-client privilege and work-product protection may be bad policy. Whether or not the government makes this a requirement as part of cooperation in a particular case, the policy itself can chill internal corporate investigations. Despite criticisms of these investigations, they can play important supporting roles for law enforcement. Private law firms can often bring to bear the resources, investigative experience and expertise, and familiarity with a particular industry that a busy U.S. Attorney's office either does not possess or cannot deploy on short notice. If the guidelines are read to require waivers as a condition of getting credit for cooperation, then in the long run, enforcement interests could suffer.

Furthermore, defense counsel conducting an internal investigation must already warn corporate officers and employees before an interview that the attorney-client privilege belongs to, and may be waived by, the corporation. Now, witnesses will also have to be warned that, if the company self-reports, the government may require a waiver that results in disclosure of the contents of the interview. For a person on the fence about cooperating with the internal investigation -- for example, someone who is on the border

[15] Federal Prosecution of Corporations § VI.A.

[16] Id. § VI.B. The guidelines note, however, that the waiver should normally be limited to the factual internal investigation and any advice given contemporaneously with the conduct at issue. Id. § VI.B. n. 2. "Except in unusual circumstances," prosecutors should not request a waiver of privileges as to communications between company representatives and criminal defense counsel. Id.

[17] § VI.B.

[18] Id.

between being a target of the government's investigation and being a witness -- the additional warning may be the deciding factor that drives him or her to silence.

Prosecutors may also evaluate a company's cooperation by analyzing whether and how a corporation is protecting its employees and agents. For example, the corporation that advances fees to culpable employees and fails to sanction them, or provides information to them pursuant to a joint defense agreement, may not be sufficiently cooperating to avoid indictment.[19]

Once a company cooperates with the government, the standard terms of joint defense agreements require the company to withdraw from the joint defense group. After withdrawal, the government may not compel the company to reveal the information it learned from the other participants pursuant to the joint defense agreement.

A federal prosecutor should also consider a corporation's compliance program, even if the existence of such programs does not completely absolve a corporation of wrongdoing.[20] To that end, the guidelines invite prosecutors to evaluate the design and effectiveness of such programs by considering such factors as the program's comprehensiveness, any remedial actions taken by the corporation, the staffing of the corporation's compliance effort, the education of employees about the compliance program, the company's commitment to the program and the extent to which the compliance program is tailored to the specific criminal conduct likely to occur at the company.[21] If necessary, federal prosecutors should consult with the relevant federal and state agencies to help them evaluate a particular compliance program.

The corporation that is quick to recognize and improve its program will decrease the likelihood of indictment.[22] Moreover, in the event of conviction, the existence of an effective compliance program would result in substantial reductions under the Sentencing Guidelines.[23] In making a pitch to prosecutors, defense counsel should be prepared to discuss a client's compliance program, including details about how the program has functioned in the past.

The new guidelines further instruct federal prosecutors to consider remedial and restitutionary measures in deciding whether to indict. Remedial measures include strengthening a compliance program; making organizational, operational and personnel changes; and taking other internal disciplinary measures that demonstrate an organization's commitment to reforms, rather than to the protection of employees.[24]

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[19] Id. As the guidelines recognize, in part, state law and a corporation's bylaws may require legal fees to be advanced under certain circumstances. Id. § VI.B. n. 3.

[20] Id. § VII.A.

[21] Id. § VII.B.

[22] Id. §§ VII.B. VIII.B.

[23] See, e.g., U.S.S.G. §§ 8A1.2, comment. (n. 3(k)), 8C2.5(f).

[24] Federal Prosecution of Corporations § VIII.B; see also id. § XII.B (describing post-plea arrangements to ensure remediation, such as agreeing to third-party or government audits and filing financial statements).

Crime and punishment

Prosecutors should further consider collateral consequences arising from the corporation's indictment. The guidelines recognize that the damage may be unfair to the corporation's officers, directors, employees and shareholders who played no role in the criminal conduct and who could not have prevented it. However, the consequences to a corporation's stakeholders may not be unfair if they profited from the corporation's wrongdoing.

Similarly, according to the guidelines, not everything that results from criminally charging a corporation -- for example, exclusion from participation in federal programs -- is necessarily inappropriate. Some byproducts of a corporate indictment are "a direct and entirely appropriate consequence of the corporation's wrongdoing."[25] But when collateral consequences would be disproportionate to the offense, the guidelines advise prosecutors to be cautious.

Federal prosecutors should also consider the existence of noncriminal alternatives to criminal charges, including the possible sanctions available under the alternative mechanism, the likelihood that an effective sanction will be imposed and "the effect of non-criminal disposition on Federal law enforcement interests."[26]

Generally, the pitch that "this is really a civil case," and accordingly, best left to the Securities and Exchange Commission or some other regulator, is among the weakest in defense counsel's arsenal. That said, when the target of an investigation is a corporation -- and the most likely penalty is a fine anyway -- the pitch may have some effect on prosecutors, particularly if a corporation has not engaged in an egregious violation of law or does not have a history of past misconduct, or if the case against the company is weak or based on an unprecedented legal theory.[27]

Pre-indictment advocacy is more art than science. The checklist derived from the new DOJ guidelines provides, at best, a framework for an effective strategy, but there are a few rules that apply across different cases. Obviously, whenever possible, corporate counsel should emphasize factual reasons the corporation has not committed the offense and factual reasons the government is not likely to win.

Corporate counsel should also avoid appeals to prosecutorial sympathy -- for example, the quaint "My guy's a good guy" or its corporate analog, "Don't hurt the innocent shareholders." Notwithstanding the fact that the new DOJ guidelines are not enforceable against the government in court, they do provide useful signposts for any pre-indictment pitch.

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[25] Id. § IX.B.

[26] Id. § X.A

[27] See id. § X.B.

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